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Convention on the Rights of Persons with Disabilities

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Committee on the Rights of Persons with Disabilities

Decision adopted by the Committee under article 2 of the Optional Protocol, concerning communication No. 28/2015* **

Communication submitted by	[redacted] (represented by Lars Andén)
Alleged victims	[redacted], [redacted], [redacted] E.L. E.J.
State party	Sweden
Date of communication	10 March 2015 (initial submission)
Document references	Decision taken pursuant to rules 64 and 70 of the Committee's rules of procedure, transmitted to the State party on 19 March 2015 (not issued in document form)
Date of adoption of the decision	10 August 2017
Subject matter	Deportation of child with autism and his family to Nigeria
Procedural issues	Exhaustion of domestic remedies; substantiation of claims; admissibility — *ratione materiae*; admissibility — *ratione personae*
Substantive issues	Equal recognition before the law; access to justice; freedom from cruel, inhuman or degrading treatment; right to education; right to health services; right to habilitation and rehabilitation services; right to adequate standard of living and social protection
Articles of the Convention	3, 6, 9, 7, 12, 13, 15, 24, 25, 26 and 28
Articles of the Optional Protocol	1, 2 (b), (d) and (e)

* Adopted by the Committee at its eighteenth session (14–31 August 2017).

** The following members of the Committee participated in the examination of the communication: Ahmad Al Sadi, Undarmaa Bazarsad Uranbileg, Matthew Cocks, Imed Eddine Chaker, Theresia Degener, Samuel Njuguna Kabue, Dhanraj Shah Kaw, Stig Langvad, Laszlo Gabor Lovaszy, Robert George Martin, Martin Babu Mwesigwa, Carlos Alberto Parra Dussan, Gnomaravel Pyaneandee, Valery Nikitich Rukhlyadev, Amna Rushdi and Damjan Tatic.

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1.1 The author of the communication is O.O.J., a Nigerian national born in 1984. He is submitting the communication on his own and on behalf of his son E.O.J, born in 2010, his wife F.I.J., born in 1982, and his daughter E.J., born in 2012. The author's son, E.O.J., was diagnosed with autism and unspecified psychosocial disabilities in 2013. The author and his family's application for asylum was rejected by the State party on 30 April 2014. The author alleges that the deportation of the family from Sweden to Nigeria would amount to a violation of articles 3, 4, 5, 7, 12, 13, 15, 24, 25, 26 and 28 of the Convention. The Optional Protocol entered into force for the State party on 14 January 2009. The author is represented by counsel.

1.2 On 19 March 2015, pursuant to rule 64 of the Committee's rules of procedure, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, issued a request for interim measures under article 4 of the Optional Protocol, requesting the State party to refrain from deporting E.O.J. and his family to Nigeria pending the examination of the communication by the Committee.

A. Summary of the information and arguments submitted by the parties

Facts as presented by the author

2.1 The author's wife held a temporary residence permit for studies in the State party from 1 August 2008 to 2 October 2010. The author held a temporary residence permit in the State party on the grounds of family ties from 21 January 2010 to 2 October 2010. He applied for a residence permit as self-employed, in September 2010. E.O.J. was born in December 2010, in Sweden. On 25 January 2012, the author's and his wife's application for residence permits was rejected by the Swedish Migration Agency and a deportation order was issued. Subsequent appeals to the Migration Court and the Migration Court of Appeal were rejected and the decision became final on 13 November 2012. Owing to the insecurity in Nigeria, the family feared returning there. They therefore filed an application for asylum in the State party on 10 January 2013. In autumn 2013, E.O.J. was diagnosed with autism and other unspecified psychosocial disabilities. An underlying suspicion of attention deficit hyperactivity disorder (ADHD) was also detected. The author submitted this information to the Migration Agency together with a medical report from a psychologist and a report from a welfare officer, in support of the family's asylum application. The author was informed that his son's health case would be handled separately, independent of the asylum application. The author requested information from the Migration Agency as to the reasons why E.O.J.'s health case had been separated from the asylum application case, but he received no information in that regard.

2.2 On 30 April 2014, the family's application for asylum was rejected by the Migration Agency. The Agency stated that the application should be examined primarily in the light of the conditions in the family's home town of Lagos. It concluded that the family had not plausibly demonstrated that they would personally be at risk of harm if returned to Nigeria.

2.3 In June 2014, the Migration Agency rejected the family's application for residence permits on the basis of E.O.J.'s medical needs (the health case). It was stated in the decision that information obtained through the Medical Country of Origin Information (MedCOI) site showed that help could be obtained for E.O.J. in Nigeria. Two hospitals offering treatment and services for autistic children were specifically referred to in the decision, namely the national hospital in Abuja and the federal neuropsychiatric hospital in Yaba. It was also stated that there were preschools in Nigeria that accepted autistic children. It was further stated that the family had not submitted a medical report in support of their claim, only a journal entry. The author claims that the decision did not make reference to the reports that had been submitted with their asylum application, which included a diagnosis of his son's condition as established by a psychologist.

2.4 Upon receipt of the decision of June 2014, the author and his family tried to contact the hospitals referred to in the decision. They managed to contact a senior doctor at the national hospital, who replied that the hospital did not offer services for children with autism. The head of paediatrics at the hospital also informed them that neither the Government nor the Ministry of Health had centres dedicated to dealing with autistic

children. The author also tried to contact the federal neuropsychiatric hospital in Yaba, but received no reply. However, information on the hospital's website regarding services offered did not indicate that the hospital provided treatment for children with autism. As it was also stated in the decision of the Migration Agency that most of the federal medical centres and teaching hospitals in Nigeria provided services for children with autism, the author tried to find information in that regard. However, he did not find any indication that such services were available. After several attempts, the author managed to contact a doctor at the University of Abuja Teaching Hospital. In a telephone conversation, the doctor stated that the hospital did not offer services for autistic children. The author also tried to find preschools for autistic children in Nigeria on the Internet, but could not find any.

2.5 On 30 October 2014, the decision to reject the family's application for asylum was upheld by the Migration Court. The author and his wife submitted an application for leave to appeal to the Migration Court of Appeal on 2 December 2014. In that submission, the author's counsel addressed the issue of the separation of E.O.J.'s health case from the family's asylum case. The family's application for leave to appeal was rejected by the Migration Court of Appeal on 22 December 2014.

2.6 In November 2014, the author and his wife applied for the expulsion order not to be enforced under an impediment of enforcement procedure and for them to be granted residence permits on the grounds of their son's disability. In that application, they included the information that they had received from the Nigerian hospitals, a description of the symptoms suffered by their son and a report from the psychologist who was treating E.O.J. in Sweden. On 9 January 2015, the Migration Agency issued a negative decision, reiterating its first decision of June 2014 and stating that medical care for children with autism as well as preschools for children with autism were available in Nigeria.

2.7 On 30 January 2015, the author and his wife filed another application for impediment of enforcement of the deportation order and provided information from three sources in Nigeria, according to which, no help would be available for their son in Nigeria, neither from the aforementioned hospitals referred to by the Migration Agency nor from any public hospital. The evidence submitted by the author included a statement from a speech pathologist in Nigeria, who stated that the public health system in Nigeria did not provide autism-specific services, an article from a psychologist and an advocate for children with autism in Nigeria, which stated that services in Nigeria for children with autism were inadequate or non-existent, even for parents who could afford private health care. The author and his wife also provided a newspaper article on the situation of children with autism in Nigeria, according to which, no governmental policy initiative had been developed for autism treatment, and a report from their son's doctor in Sweden, stating that E.O.J.'s case was different from that of other autistic children with average intelligence, because of his multiple developmental disabilities. The doctor noted that E.O.J. was undergoing treatment that could not be interrupted and that the treatment was scheduled to continue for an additional year and a half in order to achieve positive results and avoid further complications. The author also attached to the application reports from his son's preschool, describing his development and explaining why he should remain in the same environment for there to be any improvement.

2.8 On 26 February 2015, the application was rejected by the Migration Agency on the grounds that assistance was available in Nigeria. The case officer noted that E.O.J.'s ill health was not sufficiently attested through medical certificates drawn up in accordance with the National Board of Health and Welfare regulations. However, he considered that the existence of a valid medical certificate was not of crucial importance to the case. He found the newspaper article on the situation of autistic children in Nigeria to be intended as an opinion piece and did not constitute the kind of objective country information that could be used to assess the care available in the country. The report by the psychologist and advocate for the rights of people living with autism in Nigeria was also found to be an opinion piece and not an objective report on access to care for people with autism in Nigeria. The case officer noted that the statement from the speech pathologist only mentioned that there was no help available from the public health-care system, but did not provide any information on the private sector. The decision of the Migration Agency was not subject to appeal.

The complaint

3.1 The author considers that Sweden, through its Migration Agency, has violated his son's rights under article 7 (2) of the Convention. The author alleges that the Migration Agency consistently maintained its stance to deport E.O.J. and his family to Nigeria without considering the severe health consequences of such an action. The author notes that the medical report from E.O.J.'s doctor states that his son is in need of continuous care and support from specially trained personnel who can assist both his parents and his learning facilitators in order to achieve what is best for him.

3.2 The author also considers that the State party has also violated his son's rights under article 12 (4) of the Convention, insofar as the domestic authorities did not ensure that all measures were taken to enable E.O.J. to exercise his legal capacity. The author considers that the Migration Agency did not respect E.O.J.'s rights, will and preferences. The author also considers that the measures taken were not free of conflict of interest and undue influence, as the health case was decided by the same department of the Migration Agency and was not subject to appeal. The author submits that, the fact that no oral hearing took place in relation to E.O.J.'s health case is also a violation of article 12 of the Convention.

3.3 The author submits that the measures taken by the domestic authorities were not proportional and tailored to E.O.J.'s circumstances as the Migration Agency did not make any effort to personally contact the hospitals in Nigeria to ascertain the authenticity of the claims of E.O.J.'s parents concerning the unavailability of medical care and education for autistic children. The author considers that the Agency intentionally disregarded all attempts to show that the information gathered from the MedCOI database were not adapted to his son's case. He also considers that the appeals and new applications that he submitted regarding the case were not reviewed by an independent and impartial authority.

3.4 The author considers that his son's rights under article 15 (2) of the Convention have been violated insofar as a deportation to Nigeria would amount to inhuman and degrading treatment, considering the nature of E.O.J.'s disability and circumstances. On this point, the author joins a letter sent by his wife to the Migration Agency and other authorities in which she describes: (a) that E.O.J. sometimes has injuries and they do not know how he has gotten them; (b) the difficulties that they daily face as parents in attending to their child to help and protect him; (c) their need for support in dealing with his unexpected reactions and behaviours; (d) their fear that their child and the whole family would be excluded from Nigerian society because of his disability, regarding which there is no awareness in the country.

3.5 The author notes that, currently, E.O.J receives the kind of support he needs at his preschool and through the intensive behavioural therapy sessions he attends with his parents and personal learning facilitator. The author argues that deporting E.O.J. to Nigeria, where there is no access to the kind of education and support he requires would amount to a violation of his son's rights under article 24 of the Convention, as it would automatically interrupt the support and treatment he is currently receiving.

3.6 In addition, the author considers that deportation of the family to Nigeria would deprive his son of access to adequate health care and to the habilitation and rehabilitation programmes he has been attending, which have had positive results. He therefore considers that their removal to Nigeria would amount to a violation of his son's rights under articles 25 (a) and 26 of the Convention.

3.7 Finally, the author considers that, in case of their removal to Nigeria, his son's right to an adequate standard of living and social protection in compliance with article 28 (2) (a) of the Convention would be violated, insofar as he would be denied access to appropriate and affordable services, devices and other support to meet his disability-related needs. The author argues that all these violations are against the best interests of the child.

State party's observations on admissibility

4.1 On 22 June 2015, the State party submitted its observations on the admissibility of the communication. It requested that the admissibility of the communication be examined separately from the merits, in accordance with rule 70 (8) of the Committee's rules of

procedure. The State party submits that the communication should be declared inadmissible *ratione personae* under article 1 of the Optional Protocol[1] and under article 2 (e) of the Optional Protocol as being manifestly ill-founded for lack of substantiation.

4.2 The State party provides an overview of the relevant domestic legislation pertaining to the expulsion of aliens. It notes that under the Aliens Act (2005), matters concerning the rights of aliens to enter and remain in the State party are normally processed by three instances: the Migration Agency, the Migration Court and the Migration Court of Appeal. A person who has a well-founded fear of being subjected to torture or inhuman and degrading treatment or punishment if removed to his or her country is entitled to a residence permit in Sweden, and there is an absolute prohibition on the expulsion of a person to a country where he or she would be at risk of being subjected to such treatment. Moreover, under certain conditions, a person may be granted a residence permit even if an expulsion order has been issued and the decision has become final, namely if new circumstances have emerged that would indicate that he or she would be at risk of being sentenced to death or that he or she would be subjected to torture or inhuman and degrading treatment or punishment, or when there are medical or other special reasons why the order should not be enforced. Special consideration is also paid to the situation of children who may be granted a residence permit, even if the circumstances invoked are not as grave as those required for the granting of residence permits for adults.

4.3 The State party notes that the author's complaint has been examined by the Migration Agency and the migration courts. The health reasons invoked have also been subject to consideration by the domestic authorities, which have held that the author and his family are not entitled to residence permits. In its assessment, the domestic authorities considered that the health reasons invoked are not of such a nature that the deportation of the author and his family would amount to inhuman or degrading treatment.

4.4 The State party notes that under article 1 of the Optional Protocol, the Committee is competent to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by the State party of the provisions of the Convention. The State party notes that the author's allegations under articles 7, 12, 24, 25, 26 and 28 of the Convention are based on the assumption that the rights of the author and his family would be violated in Nigeria, if they were to be deported there. The State party notes that Nigeria is a party to the Convention and its Optional Protocol. The State party therefore argues that the complaint is outside its jurisdiction for the purposes of the Optional Protocol. The State party submits that the complaint should be declared inadmissible *ratione personae* under article 1 of the Optional Protocol, as it relates to articles 7, 12, 24, 25, 26 and 28 of the Convention.

4.5 As regards the author's allegations under article 15 of the Convention, the State party requests the Committee to consider whether that provision also encompasses the principle of non-refoulement. In doing so, the State party notes that claims relating to the non-refoulement principle may be lodged under several other international human rights procedures. If the Committee takes the view that article 15 of the Convention includes an obligation of non-refoulement, the State party submits that this obligation should only extend to claims relating to an alleged risk of torture upon the return of the victim to his or her country of origin.

4.6 Irrespective of the Committee's conclusion as to whether article 15 of the Convention entails an obligation of non-refoulement, the State party submits that the complaint should be held inadmissible for lack of substantiation. The State party refers to the jurisprudence of the Committee against Torture, according to which, the burden of proof rests on the complainant who must present an arguable case establishing that he or she runs a foreseeable, real and personal risk of being subjected to torture.[2] The State party also refers to the Committee against Torture general comment No. 1 (1997) on the

[1] The Committee understands that, given the argumentation presented by the State party, it is referring to the Committee's competence *ratione materiae*.

[2] See Committee against Torture, communications No. 178/2001, *H.O. v. Sweden*, Views adopted on 13 November 2001, para. 13, and No. 203/2002, *A.R. v. Netherlands*, Views adopted on 14 November 2003, para. 7.3.

implementation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, according to which, the Committee is not a fourth degree of jurisdiction, and that considerable weight will be given to findings of facts that are made by organs of the State party concerned (para. 9). The State party further refers to the jurisprudence of the Committee against Torture, according to which, it is for the courts of the States parties to the Convention to evaluate the facts and circumstances in a particular case, unless it can be ascertained that the manner in which such facts and evidence were evaluated were clearly arbitrary or amounted to a denial of justice.[3] The State party submits that the above-mentioned principle should be taken into account in cases before the Committee as well.

4.7 The State party submits that the author's claims have been thoroughly examined by the domestic authorities and that there is no reason to conclude that the considerations were inadequate, arbitrary or amounted to a denial of justice. Accordingly, the State party submits that great weight must be given to the original opinions of the State party's migration authorities, as expressed in their rulings.

Author's comments on the State party's observations on admissibility

5.1 On 24 and 28 July 2015, the author submitted his comments on the State party's observations on admissibility. He maintains that the communication is admissible.

5.2 As regards the application for residence permits based on his son's disability, the author submits that it was considered by the Migration Agency only and that the decision of the Agency was not subject to appeal. Subsequently, the only part of the family's claims that were tried in court were their application for asylum. He submits that this in itself amounts to a violation of articles 3 (a)-(b) and (e)-(f), 4 (a)-(e), 5 (1)-(4), 7 (1)-(2), 12 (4), 13 (1)-(2), 24, 25, 26 (1) and 28 of the Convention.

5.3 The author also submits that the Migration Agency lacks the medical expertise to handle complex cases like E.O.J.'s and that it fails to involve such expertise in its decision-making process, in violation of article 12 of the Convention. In addition, the author notes that, while a person applying for asylum is entitled to a public legal counsel, this is not the case for applications on humanitarian and compassionate grounds such as E.O.J.'s health case, in which the family was represented pro bono. He submits that this strongly limits the possibilities to seek and obtain justice.

5.4 The author also notes that his claims under article 12 of the Convention were made in relation to the proceedings available in the State party. He argues that it is foreseeable that the deportation of E.O.J. to Nigeria will cause irreparable harm to his health and development and will amount to inhuman treatment. He submits that it is the State party's responsibility to ensure that such harm is not caused. The author also submits that it is foreseeable that Nigeria will not be able to protect E.O.J.'s rights under the Convention if he were to be deported.

5.5 On 21 August 2015, the Special Rapporteur on new communications and interim measures, acting on behalf of the Committee, decided not to grant the State party's request for the admissibility of the communication to be examined separately from the merits.

State party's observations on the merits and additional observations on admissibility

6.1 On 11 April 2016, the State party submitted its observations on the merits of the communication. The State party submits that the claims under articles 3, 4, 5, 7, 12, 13, 24, 25, 26 and 28 of the Convention should be declared inadmissible under article 1 of the Optional Protocol. It reiterates its position with regard to the claim under article 15 of the Convention and states that should the Committee find that the communication is admissible, the State party submits that it is without merit.

6.2 The State party describes the domestic legislation pertaining to residence permits under the Aliens Act. It notes that under article 7 (2) of the Convention, the best interests of the child must be a primary consideration in all actions concerning children with disabilities.

[3] Ibid., communication No. 219/2002, *G.K. v. Switzerland*, Views adopted on 7 May 2003, para. 6.12.

It also notes that the principle of the best interests of the child is also expressed in the Aliens Act, which stipulates that particular attention must be given to the child's health and development and the best interests of the child, in general.

6.3 The State party further notes that, under chapter 12, section 18, of the Aliens Act, the Migration Agency, on its own motion, may raise and examine the issue of whether there is an impediment to enforcement of an expulsion order. A decision not to grant a residence permit under chapter 12, section 18, of the Act is not subject to appeal. However, the Migration Agency can initiate an examination at several junctures, depending on the circumstances cited. If a residence permit is not granted under chapter 12, section 18, of the Aliens Act, the Migration Agency may decide to re-examine the matter under chapter 12, section 19, of the same Act. In accordance with that provision, a re-examination shall be carried out when it may be assumed, on the basis of new circumstances invoked by the applicant, that there are lasting impediments to enforcement. In order to be granted a re-examination of the application for a residence permit pursuant to chapter 12, section 19, of the Aliens Act, the new circumstances cited must be related to the applicant's need for protection in Sweden. Therefore, until recently, if the circumstances cited referred to, for instance, grounds pertaining to the applicant's existing state of health, a new examination could not be granted pursuant to chapter 12, section 19, of the Aliens Act. However, according to a decision of the Migration Court of Appeal of 24 March 2015, a new examination may be granted in certain exceptional cases, for example, if an applicant's life-threatening disease can lead to the view that expulsion would constitute inhuman or degrading treatment in contravention of article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), and would thereby constitute grounds for protection.

6.4 With regard to the admissibility of the communication, the State party maintains its observations of 22 June 2015 and submits that, as regards the complaint under articles 7, 12, 24, 25, 26 and 28 of the Convention, the author's claims are not based on any treatment that he claims his son will suffer in Sweden, but on treatment that he is likely to suffer in Nigeria. As such, the State party considers that the decision to return the family to Nigeria cannot trigger Sweden's responsibility under the above-mentioned articles of the Convention. The State party therefore submits that the Committee lacks jurisdiction over the author's claims under articles 7, 12, 24, 25, 26 and 28 of the Convention in respect of Sweden, and that those claims are therefore inadmissible *ratione personae*, under the Optional Protocol to the Convention.

6.5 The State party notes that the author has also claimed that the State party's authorities violated his and his family's rights under articles 3, 4, 5, 7, 12, 13, 24, 25, 26 and 28 of the Convention in the processing of their applications for residence permits. The State party submits that the author failed to substantiate these claims for the purposes of admissibility.

6.6 As regards the complaint under article 15 on torture and cruel, inhuman or degrading treatment or punishment, the State party reiterates its observations of 22 June 2015. It argues that the concept of jurisdiction for the purposes of article 15 of the Convention must be considered within the general meaning of the term in public international law. The State party submits that only in exceptional circumstances can acts of States parties that produce effects (extraterritorial effects) in other States amount to responsibility for the acting State party. It submits that no such exceptional circumstances exist in the present case and that it cannot be held responsible for violations of the Convention that are likely to be committed by another State party outside of Swedish territory and jurisdiction. The State party refers to the case law of the European Court of Human Rights, in which it has clearly stressed the exceptional character of extraterritorial protection of the rights contained in the European Convention.[4] It notes that the Human Rights Committee has adopted a similar approach.[5]

[4] See European Court of Human Rights, *Soering v. the United Kingdom*, application No. 14038/88, judgment of 7 July 1989, paras. 88 and 113; *Mamatkulov and Askarov v. Turkey*, application Nos. 46827/99 and 46951/99, judgment of 4 February 2005, para. 91; *Tomic v. the United Kingdom*, application No. 17837/03, decision of 14 October 2003; *F. v. the United Kingdom*, application No.

The State party therefore submits that an explicit right not to be returned to a country where an author is at risk of suffering inhuman treatment owing to his or her state of health cannot be derived from the provisions of the Convention and that the complaint should therefore be dismissed as inadmissible *ratione personae* under article 1 of the Optional Protocol. The State party further reiterates that, should the Committee find that the author's claim in relation to article 15 is admissible under article 1 of the Optional Protocol, then it should be declared inadmissible as being manifestly ill-founded.

6.7 As regards the merits of the case, the State party considers that the enforcement of the decision to return the author and his family to Nigeria does not constitute a violation by Sweden of the Convention. The State party argues that the burden of proof in cases such as the present one rests with the author, who must present an arguable case establishing that he or she runs a foreseeable, real and personal risk of being subjected to torture if returned to his or her country of origin. In addition, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. Although the risk does not have to meet the test of being highly probable, it must be personal and present. The State party refers to its observations of 22 June 2015 with regard to the jurisprudence and general comment No. 1 of the Committee against Torture.

6.8 The State party notes that there are several provisions in the Aliens Act which regulate impediments to enforcement of an expulsion order. According to chapter 12, section 1, of the Aliens Act, an alien must not be sent to a country where there is fair reason to assume that he or she would be in danger of suffering the death penalty or of being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment. The State party reiterates that, under certain conditions, an alien may be granted a residence permit even if a refusal-of-entry or expulsion order has gained legal effect (see para. 4.2 above).

6.9 The State party notes that a public counsel was appointed to represent the author and his family in the asylum case and that their asylum claim was investigated, both orally and in written form, with an interpreter and in the presence of counsel. An appeal lodged against the decision in the asylum case was examined by the Migration Court and the Migration Court of Appeal. The State party also notes that the question of whether the disability of the author's son and his need for care could be considered to constitute an impediment to enforcement was examined by the Migration Agency under chapter 12, section 18, on four separate occasions. Through their counsel, the author and his family were asked to submit documentation on E.O.J.'s diagnosis and care needs. Furthermore, through the Medical Country of Origin Information, the Migration Agency investigated what type of care is available in Nigeria to a child with E.O.J.'s disability. In the request sent by Medical Country of Origin Information to a local medical doctor in Nigeria, information was requested on whether inpatient and outpatient treatment by child psychiatrists, paediatricians, child psychologists and day care for autistic children were available in Nigeria, and in which locations. In the reply, the local doctor stated that psychologists and psychiatrists are available at most tertiary centres and that they attend to children. He also stated that the federal neuropsychiatrist hospital in Lagos has child psychiatrist and child psychologist services and that day care for children with autism is available in Lagos.

6.10 The State party notes the author's allegation that there was no oral hearing in the case. It, however, submits that an oral hearing was held during the asylum proceedings before the Migration Agency and that the author did not request an oral hearing before the Migration Court.

6.11 The State party also notes that the author claims that the decisions not to grant his son a residence permit under chapter 12, section 18, of the Aliens Act (in relation to the health case) was non-appealable and that that constitutes a violation under the Convention. The State party argues that chapter 12, section 18, is applicable if new circumstances

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17341/03, decision of 22 June 2004, and *Z. and T. v. the United Kingdom*, application No. 27034/05, decision of 28 February 2006.

See Human Rights Committee, communications No. 1302/2004, *Khan v. Canada*, decision adopted on 25 July 2006, and No. 2284/2013, *F.M. v. Canada*, Views adopted on 5 November 2015.

should emerge after an expulsion order has become final. It also argues that the cases of the author and his family were thoroughly examined by both the Migration Agency and the migration courts which are specialized bodies with particular expertise in the field of asylum law and practice. The State party further notes that there is nothing to indicate that the author's son has been discriminated against on grounds of his disability in the course of the proceedings. It also notes that, while residing in Sweden, the author's son has access to childcare and health care on an equal basis as other children residing in Sweden, including access to special support and care owing to his health status. The State party submits that there is therefore no reason to conclude that the outcome of the domestic proceedings was in any way arbitrary or amounted to a denial of justice. The State party also submits that the author's claims under articles 3, 4, 5, 7, 12, 13, 24, 25, 26 and 28 of the Convention should be declared inadmissible for lack of substantiation.

6.12 The State party notes the author's claim that the deportation of his son to Nigeria would subject him to inhuman treatment as he will not have access to the same care, support, education and training as he does in Sweden. The State party refers to the jurisprudence of the European Court of Human Rights in cases concerning the expulsion of persons who are ill, in which the Court has consistently held that contracting States have the right to control the entry, residence and expulsion of aliens. However, in exercising their rights in this respect, contracting States must have regard to article 3 of the European Convention.[6] It also notes that the Court has found that the assessment of the minimum level of severity which must be attained in order for ill-treatment to fall within the scope of article 3 of the European Convention is relative and depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the person concerned.[7] The State party refers to the Court's Grand Chamber judgment in the case of *N. v. United Kingdom*,[8] in which the Court held that the fact that an applicant's circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the contracting State is not sufficient in itself to give rise to a breach of article 3 of the European Convention. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the contracting State may raise an issue under article 3, but only in exceptional cases, where the humanitarian grounds against the removal are compelling. The Court also held that aliens who are subject to expulsion cannot, in principle, claim any entitlement to remain in the territory of a contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State. The Court noted that advances in medical science, together with social and economic differences between countries, entail that the level of treatment available in the contracting State and the country of origin may vary considerably and that while it is necessary for the Court to retain a degree of flexibility to prevent expulsion in very exceptional cases, article 3 does not place an obligation on the contracting State to alleviate such disparities through the provision of free and unlimited health care to all aliens without a right to stay within its jurisdiction.[9] In the case of *S.H.H. v. United Kingdom*,[10] the Court found that the high threshold is applicable even when interpreting article 3 of the European Convention in conjunction with the Convention on the Rights of Persons with Disabilities. The State party considers that a similarly high threshold as that set by article 3 of the European Convention should apply to claims under article 15 of the Convention on the Rights of Persons with Disabilities.

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[6] See European Court of Human Rights, *Bensaid v. the United Kingdom*, application No. 44599/98, judgment of 6 February 2001, para. 32.

[7] Ibid., *Cruz Varas and others v. Sweden*, application No. 15576/89, judgment of 20 March 1991.

[8] Ibid., *N. v. the United Kingdom*, application No. 26565/05, judgment of 27 May 2008, para. 29.

[9] Ibid., *Bensaid v. the United Kingdom*; *Aoulmi v. France*, application No. 50278/99, judgment of 17 January 2006; *S.H.H. v. United Kingdom*, application No. 60367/10, decision of 29 January 2013; and *Senchishak v. Finland*, application No. 5049/12, decision of 18 November 2014.

[10] See *S.H.H. v. United Kingdom*.

6.13 The State party notes that, in its jurisprudence, the Committee against Torture has held that the aggravation of the condition of an individual's health by virtue of deportation is generally insufficient to amount to degrading treatment.[11]

6.14 As regards the question of whether the needs of the author's son in terms of care and support would constitute an impediment to enforcement of the expulsion order, the State party argues that a rigorous examination, in substance, of the grounds invoked was made on several occasions by the domestic authorities. In the course of the domestic proceedings, it was not possible to accurately establish a diagnosis for the author's son. However, it follows from the most recent copy of a certificate, issued by a medical doctor in January 2015, that he "probably has autism", but may also suffer from hyperactivity and developmental impairment, and that, as he is still so young, it is too early to establish a final diagnosis. The medical certificate also indicates that the author's son undergoes intensive behavioural therapy that involves both his parents and his preschool staff. The State party argues that there are institutions in Nigeria that can support children with special needs owing to mental disabilities, such as autism. For instance, treatment by a child psychiatrist and child psychologist as well as centres that provide day care for autistic children are available, including in the Lagos area, where the family originates. The State party therefore submits that the grounds invoked in the case at hand do not reach the high threshold set by other international courts and committees and can therefore not be considered to be of such a nature that an expulsion of the author and his family would contravene article 15 of the Convention.

6.15 The State party also notes that the Migration Agency, in its examination, did not attach any importance to the fact that an accurate diagnosis for the author's son had not been established, but accepted the information provided in that regard and adequately investigated the availability of psychiatric and psychological care for children in Nigeria.

Author's comments on the State party's additional observations

7.1 On 17 June 2016, the author submitted his comments on the State party's additional observations. The author refers to his comments of 24 and 28 July 2015. Concerning the admissibility of the communication, he argues that the State party has jurisdiction to determine if residence permits should be granted to the family and that, consequently, their claims before the Committee are admissible.

7.2 The author submits that an oral hearing concerning E.O.J.'s health was not held; the hearing referred to by the State party concerned the family's application for asylum. The author argues that the information referred to by the State party obtained from Medical Country of Origin Information is not detailed enough to provide information as to whether adequate treatment is available for E.O.J. in Nigeria, considering his complex condition.

7.3 The author argues that the only support E.O.J. receives in the State party is behavioural therapy, and that neither he nor his wife receive any other support. The author also claims that the State party has violated E.O.J.'s right to an adequate standard of living and social protection in relation to article 28 (2) of the Convention, by not providing adequate accommodation measures.

7.4 The author notes that the State party claims that it was not possible to accurately establish a diagnosis for E.O.J. during the domestic proceedings. He submits that E.O.J. was clearly diagnosed with autism, as stated in two reports submitted by psychologists, a report from a medical doctor and a report from a welfare officer, all submitted to the Migration Agency.

[11] See Committee against Torture, communications No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998; No. 228/2003, *T.M. v. Sweden*, Views adopted on 18 November 2003; and No. 434/2010, *Y.G.H. et al v. Australia*, Views adopted on 14 November 2013.

Additional observations

From the State party

8.1 On 11 November 2016, the State party submitted additional observations in response to the author's comments. The State party notes that, under chapter 12, section 22, of the Aliens Act, a refusal of entry or an expulsion order that has not been issued by a general court expires four years after the order became final and non-appealable. It notes that the Migration Court of Appeal decided not to grant the family's application for leave to appeal on 13 November 2012 and that the decision to expel the complainants accordingly became final and non-appealable on that date. It notes that the decision to expel the author, his wife and his son is therefore statute-barred as of 13 November 2016. It also notes that when a decision on expulsion becomes statute-barred, it is no longer enforceable from that date and the applicant concerned has the possibility to reapply for a residence permit and get a new full examination by the Migration Agency of all the reasons and claims he or she would like to invoke. A negative decision by the Migration Agency is subject to appeal to the Migration Court and the Migration Court of Appeal.

8.2 The State party also notes that, as of 13 November 2016, there were no longer any enforceable decisions on the basis of which the author and his family could be expelled from Sweden. In view thereof, the State party submits that, from that date, the Committee is precluded from examining the communication as the author and his family can no longer claim to be victims of a potential violation of the Convention. It submits that the communication should therefore be declared inadmissible as incompatible *ratione personae* with the Convention, under article 1 of the Optional Protocol.

8.3 In the alternative, the State party submits that the communication should be declared inadmissible under article 2 (d) of the Optional Protocol for non-exhaustion of domestic remedies. It notes that, as the expulsion order has become statute-barred, the author and his family may submit a new application to the Migration Agency, with the possibility of subsequent appeals to the Migration Court and to the Migration Court of Appeal. The State party argues that this is an effective remedy within the meaning of article 2 (d) of the Optional Protocol against the alleged risk of a violation of the Convention. The State party refers to the jurisprudence of the Committee against Torture and notes that, in several cases against Sweden, complaints before that Committee have been declared inadmissible for failure to exhaust domestic remedies because the complainants had the opportunity to initiate new asylum proceedings after the decision regarding their expulsion had become statute-barred.[12]

8.4 In response to the author's submission of 17 June 2016, the State party reiterates that the author's son has access to childcare and health care on an equal basis as other children residing in Sweden, including access to special support and care owing to his state of health.

From the author

9. On 16 December 2016 and 6 February 2017, the author submitted comments on the State party's additional observations. The author confirms that the decision on expulsion has become statute-barred and that a new application can be submitted before the Migration Agency. He, however, argues that at the time of the submission of the communication, the State party was in violation of the Convention, and that all domestic remedies had been exhausted. He argues that the relevant time for determining whether domestic remedies have been exhausted refers to the time of occurrence of the alleged violation of the Convention. He submits that the outcome of a new proceeding initiated before the Migration Agency will be greatly affected by the previous decisions and that, in reality, only information pertaining to events that have occurred after the last decision was issued will be relevant. He also submits that, owing to new legislative amendments, the possibility of receiving a positive outcome after submitting a new application is worse than before.

[12] See Committee against Torture, communications No. 58/1996, *J.M.U.M. v. Sweden*, decision adopted on 15 May 1998; No. 170/2000, *A.R. v. Sweden*, decision adopted on 23 November 2001; and No. 365/2008, *S.K. and R.K. v. Sweden*, decision adopted on 21 November 2011.

B. Committee's consideration of admissibility

10.1 Before considering any claim contained in a communication, the Committee must, in accordance with article 2 of the Optional Protocol and rule 65 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee, and has not been and is not being examined under another procedure of international investigation or settlement.

10.3 The Committee notes the author's claim that, by deporting the family to Nigeria, the State party would violate his son's rights under articles 7, 12, 15, 24, 25, 26 and 28 of the Convention, as he would not have access to adequate health care, education, habilitation and rehabilitation, standard of living and social protection in Nigeria. The Committee notes the State party's argument that the Committee lacks jurisdiction to consider these claims under the Optional Protocol, as the State party cannot be held responsible for violations of the Convention that are likely to be committed by another State outside Swedish territory and jurisdiction. The Committee notes that, under article 1 of the Optional Protocol, States parties recognize the competence of the Committee to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State party of the provisions of the Convention. The Committee is of the view that the removal by a State party of an individual to a jurisdiction where he or she would risk facing violations of the Convention may, under certain circumstances, engage the responsibility of the removing State under the Convention which has no territorial restriction clause. The Committee therefore considers that the principle of extraterritorial effect would not prevent it from examining the present communication under article 1 of the Optional Protocol.

10.4 The Committee, however, notes the State party's argument that the expulsion order of 13 November 2012 became statute-barred on 13 November 2016 and is consequently no longer enforceable. The Committee also notes the State party's argument that the author and his family have the possibility of reapplying for residence permits before the Migration Agency, with subsequent possibilities of appeals before the Migration Court and the Migration Court of Appeal. The Committee further notes the State party's argument that the complaint should be declared inadmissible as incompatible *ratione personae* with the Convention, under article 1 of the Optional Protocol, or alternatively that it should be declared inadmissible under article 2 (d) of the Optional Protocol for non-exhaustion of domestic remedies. The Committee also notes the author's argument that, at the time that he submitted the communication, the State party was in violation of the Convention and that the admissibility of the complaint should therefore be determined on the basis of the facts that were available at the time of the submission of the communication.

10.5 The Committee notes the jurisprudence of the Committee against Torture,[11] which concerned the deportation of the complainants to their country of origin in cases where, as in the present communication, the expulsion orders against the complainants had become statute-barred at the time of the examination by that Committee. The Committee against Torture found the complaints to be inadmissible owing to non-exhaustion of domestic remedies. As the decisions to expel the complainants had become statute-barred, they were therefore no longer at risk of being expelled from the State party, they had the possibility of submitting new asylum applications, which would be examined in full by the migration authorities and there was nothing to indicate that the new procedure would be ineffective in the complainants' case. The Committee also notes the jurisprudence of the European Court of Human Rights[12] concerning cases in which expulsion orders against the applicants had become statute-barred. The Court noted that, as the expulsion orders had become statute-barred, they could no longer be enforced. It also noted that the applicants could institute

[11] See *B.M.S. v. Sweden*, *S.K. and R.K. v. Sweden*, *A.R. v. Sweden*, and *J.M.U.M. v. Sweden*.

[12] See European Court of Human Rights, *Atayeva and Burman v. Sweden*, application No. 17471/11, decision of 19 February 2013, *P.Z. and others v. Sweden*, application No. 68194/10, judgment of 18 December 2012, and *B.Z. v. Sweden*, application No. 74352/11, judgment of 18 December 2012.

new and full proceedings for asylum and residence permits, in which their claims would be examined on the merits and could be appealed. The Court therefore found that there was no longer any justification to continue the examination of the applications under article 37 (1) of the European Convention and struck the cases off its list of cases.

10.6 The Committee notes that the author has not contested that the expulsion order of his family has become statute-barred or that the family has the possibility of instituting new proceedings before the migration authorities. The Committee also notes the author's argument that it is unlikely that the family would be granted residence permits if they were to reapply, given the outcome of the previous domestic proceedings. In that respect, the Committee recalls its jurisprudence, according to which, mere doubts about the effectiveness of a remedy do not absolve a person from seeking to exhaust such a remedy.[15] The Committee recalls the jurisprudence of the Committee against Torture and of the European Court of Human Rights referred to above and notes that there is nothing to indicate that a new application submitted by the author and his family to the State party authorities would not bring effective relief. The Committee also notes that, under rule 71 (2) of its rules of procedure, a decision taken by the Committee declaring a communication inadmissible under article 2 (d) of the Optional Protocol may be reviewed at a later date by the Committee upon receipt of a written request submitted by or on behalf of the individual concerned containing information indicating that the reasons for inadmissibility no longer apply. In the light of the foregoing, the Committee concludes that the author's claims that deporting his family to Nigeria would constitute a violation by the State party of his son's rights under articles 7, 12, 15, 24, 25, 26 and 28 of the Convention are inadmissible under article 2 (d) of the Optional Protocol.

10.7 The Committee notes the author's claim that the State party has violated his son's right to an adequate standard of living and social protection under article 28 (2) of the Convention by not providing adequate accommodation conditions while the family has been residing in the State party. The Committee also notes that the State party submits that the complaint should be declared inadmissible for non-exhaustion of domestic remedies. The Committee further notes that no elements in the file enable it to conclude that the author raised this claim during the domestic proceedings. The Committee therefore concludes that this part of the author's complaint is inadmissible under article 2 (d) of the Optional Protocol.

10.8 In the light of the foregoing, the Committee does not consider it necessary to examine the admissibility of the author's claim that, in the course of the domestic proceedings, the State party authorities violated his son's rights under articles 3, 4, 5, 7, 12, 13, 24, 25, 26 and 28 of the Convention.

C. Conclusion

11. The Committee therefore decides:

(a) That the communication is inadmissible under article 2 (d) of the Optional Protocol;

(b) That the decision may be reviewed under rule 71 (2) of its rules of procedure upon receipt of a written request submitted by or on behalf of the victims containing information indicating that the reasons for inadmissibility no longer apply;

(c) That the present decision shall be communicated to the State party and to the author.

[15] See communication No. 31/2015, *D.I. v. Sweden*, decision adopted on 24 March 2017, para. 7.3.